No. 724. 94. 64.

Brief of Bissell for Respondent
Petition.

Filed Mar. 8, 1897.

Office Supreme Court, U. S.
FILED
MAR 8 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
against
THE BUFFALO NATURAL GAS FUEL COMPANY.
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BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Buffalo Natural Gas Fuel Company respectfully opposes the application for a writ of *certiorari* to require the above entitled cause to be certified to this court for review and determination.

This cause arose under the Customs Administrative Act of 1890. The collector of Customs for the Port of Buffalo assessed natural gas for duty at ten per cent under Section 4 of the Tariff Act of October

1st, 1890, as a "raw or unmanufactured article not enumerated or provided for." The importer filed a protest with the Board of General Appraisers but offered no evidence and the Board of Appraisers over-ruled the protest and sustained the collector of Customs.

Thereafter and on the 28th day of November, 1891, the importer filed another protest and claimed that natural gas is exempt from duty,

(1.) As a crude bitumen under paragraph 496 of the Tariff Act of 1890, and

(2.) As a crude mineral under paragraph 651 of said Act.

Thereupon evidence was offered by the importer and the Government, the testimony of witnesses taken and the Board of General Appraisers over-ruled the decision of the collector of Customs and found that natural gas is a crude mineral and there fore exempt from duty under paragraph 651 of said Tariff Act. The Circuit Court for the Second Circuit, before which the case was fully argued, rendered its decision affirming the decision of the Board of General Appraisers, Judge Coxe writing the opinion. The case was appealed to the Circuit Court of Appeals, Second Circuit, which, after a full argument, affirmed the decision of the Circuit Court, Judge Lacombe writing the opinion of the Court, and holding that the merchandise is

properly classified as a crude mineral. Judge Wallace also wrote a brief opinion holding that the record showed that natural gas is a crude bitumen and therefore exempt from duty.

The record shows that evidence was presented to the Board of General Appraisers proving that natural gas is properly classified as a crude mineral, both by the rule of commercial designation and by the testimony of scientific experts, as well as by judicial determination, in a case arising in the Province of Ontario.

The commercial designation and classification of natural gas as a crude mineral is clearly shown by the principal commercial publication of the United States Government, to-wit.: the Statistical Abstract of the United States for the years 1888, 1889, 1890 and 1891, which is published annually by the United States Government through the Chief of the Bureau of Statistics, (who is connected with the Treasury Department, and under the direction of the Secretary of the Treasury,) and transmitted regularly to the Speaker of the House of Representatives at the December Session, each number of the Statistical Abstract being compiled from the various publications of the several departments of the Government, for the purpose of showing the commerce, industries and other important statistics for the information of Congress, and contain-

ing full statistics upon finance, coinage, commerce, immigration, shipping, the postal service, population, railroads, agriculture, etc. Two of the numbers of the Statistical Abstract referred to, to-wit, those for 1888 and 1889 were published and transmitted to Congress prior to the enactment of the Tariff Act of 1890. The twelfth number, being the Statistical Abstract for 1889, contained a recommendation of the Secretary of the Treasury for the enactment of a bill authorizing the publication of the Statistical Abstract without the necessity of a special resolution authorizing its printing. The bill recommended shows the purpose of the Statistical Abstract, and provides "that the Chief of the "Bureau of Statistics, under the direction of the "Secretary of the Treasury, shall annually prepare "and publish a Statistical Abstract of the United "States, containing in condensed and succinct "tabular form information as to the growth and "progress of trade, commerce, navigation, finance, "manufactures, postal service, population, rail-"roads, agriculture, mining, education and other "leading interests of the country, collated and "prepared from the reports published by the various "departments of the Government and from other "trustworthy sources." It further provides that "the heads of other departments of the Govern-"ment are hereby directed to furnish to the Secre-

"tary of the Treasury, so far as practicable, such "information for incorporation in this Abstract as "he may ask them to supply."

In each number of the Statistical Abstract referred to, are found tables of the Quantities and Values of Minerals produced in the United States during the calendar years from 1882 to 1889, inclusive. In all of these tables we find a classification of Metallic Minerals, such as pig iron, silver, gold, copper, lead, etc., and of Non-Metallic Minerals (of which the spot values are given), such as bituminous coal, Pennsylvania anthracite, etc., and in all of them natural gas is classified with the non-metallic minerals between petroleum and cement, as sixth on the list, and its value is stated, ranging from a value of $215,000 for the year 1882 to a value of $30,000.000 for the year 1889. In addition to this commercial designation and classification of natural gas as a mineral by the United States Government itself, the record discloses that by the testimony of scientific experts and other authorities, the preponderance of the evidence was to the effect that natural gas is a crude mineral.

See opinion of Wilkinson, G. A., page 143 of the Record.

It is submitted that the decision of the Board of General Appraisers, the decision of the Circuit Court affirming that decision, and the decision of the Circuit Court of Appeals finally determining the classification of natural gas, is founded upon the best and strongest evidence as to the commercial designation of the merchandise by the United States Government itself.

The Statistical Abstract is a compilation from all of the various commercial and other reports published by the government, and is intended especially for the information of the Ways and Means Committee, and other committees of Congress, in the preparation of acts affecting the commerce and revenues of the United States. The Statistical Abstract for 1891 mentioned in the record, classifies natural gas from a date prior to the enactment of the Tariff Law of 1890, and although the Abstract itself was published after that date it contains tables classifying the merchandise exactly as it is classified in the tables published in the Statistical Abstracts of 1888, 1889 and 1890.

The case of Marvel vs. Merritt, 116 U. S., 11, quoted by the appellant on this application, which holds that iron ore was properly classified under a general provision of the Tariff Act of 1874 as a "mineral and bituminous substance in a crude state not otherwise provided for," would seem to

be an authority for the appellee rather than the appellant; as would also the case of Lutz vs. Magone, 153 U. S., 105, in which the court say: "We do not wish to be understood as holding that in no case will the scientific designation of an article be of value in fixing its proper classification for duties, but that in a case where the popular idea of an article and its actual use in the arts are so diametrically opposed to its scientific designation the latter should prevail." The fact that it was proved in this case that the scientific designation, of natural gas as a mineral agrees with the government's commercial designation in its chief official publication on the trade and commerce of the country, certainly does not tend to discredit the decision rendered by the Board of General Appraisers, and the several courts affirming that decision. The brief opinion of Judge Wallace holding that it was also proved on the trial of this case that natural gas is a crude bitumen, is not a dissenting opinion, for crude bitumen is also a crude mineral. The learned judge quotes a commercial authority, to-wit: McCulloch's Commercial Dictionary, to the effect that "bitumen includes a considerable range of inflammable mineral substances burning with a flame in the open air, which differ in consistency from a thin fluid to a solid."

It is respectfully submitted that the decision of the Circuit Court of Appeals (which, as provided by the Federal Appellate Courts Act of March 3d, 1891, should be final in this case), is not in any way inconsistent with the decisions heretofore rendered by this court in tariff cases, and is so founded on the law and the facts as to make it unnecessary for the further review by this court of the questions decided, upon full argument in the courts below.

This application for a writ of *certiorari* should therefore be denied.

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